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Carey Real Estate Sdn Bhd v IOI Properties Group Bhd

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-881–11 OF 2019
SU TIANG JOO J
21 JANUARY 2025

C *Contract — Claims — Claim for real estate agency fees — Plaintiff claimed fees for introducing prospect tenant to defendant — Whether plaintiff's pleadings were sufficient to make out its cause of action — Whether contract made between plaintiff and defendant was certain as to its terms, price and subject matter and contingent upon tenancy agreement being made between the defendant and* D *prospect tenant or it could be one made between prospect tenant's special purpose vehicle and defendant's subsidiary — Whether plaintiff was the effective cause for the execution of tenancy agreement — Whether contract was illegal, in breach of public policy and in breach of statute — Contracts Act 1950 ss 32 & 33 — Valuers, Appraisers, Estate Agents and Property Managers Act 1981* E *— Valuer, Appraisers and Estate Agents Rules 1986*

The plaintiff was a licensed estate agent with the Board of Valuers, Appraisers and Estate Agents in accordance with the provisions of the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ('Act 242') whilst the F defendant was a public listed company with multiple subsidiaries including Resort Villa Development Sdn Bhd ('Resort Villa') that owned properties known as IOI Square 2 ('the said premises') and Puchong Financial Corporate Centre ('PFCC'). In the present case, the plaintiff claimed that it had introduced a prospect tenant known as Alih Venture Sdn Bhd ('Alih') to the G defendant and Alih had incorporated a special purpose vehicle known as Daehan Rehabilitation Services Sdn Bhd ('Daehan') to enter into a tenancy agreement and the supplemental tenancy agreement with Resort Villa in relation to the said premises. The plaintiff's claim was for its real estate agency fees, ie, the sum equivalent to 1.5 months of the gross rental payable together H with 6% Goods and Services Tax ('GST') as agreed upon between the parties. The issues to be determined in the present case were as followed: (a) pleadings — whether the plaintiff's pleadings were sufficient to make out its cause of action; (b) certainty of contract — whether the contract made between the plaintiff and the defendant was certain as to its terms, price and subject matter I and contingent upon a tenancy agreement being made between the defendant and Alih or it could be one made between Daehan and Resort Villa — in relation to this issue, the defendant asserted that the plaintiff in its letter of demand dated 20 September 2019 sought payment of fees said to be due on a date which was in conflict with the commencement date of the tenancy

agreement between Daehan and Resort Villa; (c) effective cause — whether the plaintiff was the effective cause of the tenancy agreement made between Daehan and Resort Villa; and (d) illegality — whether the contract, if any, was illegal, in breach of public policy, in breach of statute including Act 242 and the Valuer, Appraisers and Estate Agents Rules 1986 — with respect to this issue, the defendant asserted that between 1 January 2016 until 21 April 2016, the plaintiff was unlicensed and therefore not authorised to practice.

Held, allowing the plaintiff's claim with costs agreed at RM30,000 subject to allocatur to be paid by the defendant to the plaintiff:

(1) In the court's considered view, the pleadings were sufficient to put the defendant on notice of what the plaintiff was claiming ie, its professional fees for the tenant (Alih or its special purpose vehicle, Daehan) it had introduced to the defendant leading to a tenancy agreement entered over a property owned within the defendant's group of companies. Wherefore, the court found the defendant's complaint about the pleadings being insufficient was devoid of merit (see paras 10–11).

(2) In the present case, the properties to be marketed were certain, namely, properties of the defendant's group of companies including the PFCC and the IOI Square 2. Further, it was agreed upon between the parties that the professional fees were pegged at 1.5 months of gross rental plus 6% GST, as such, the contract was certain on the rate of professional fees to be payable (see paras 12 & 14–15).

(3) Based on the evidence, the negotiations were undertaken directly between Alih and the defendant. Thus, for the defendant to nitpick on a fact as to which date was the due date, when it was peculiarly within its knowledge, was devoid of merits as the plaintiff was not kept informed of these negotiations despite having informed the defendant that it was available for any clarification. What was clear was that the tenancy agreement and the supplemental tenancy agreement had become certain and unconditional on 1 September 2018 by the time the plaintiff filed its suit on 28 November 2019. The factual matrix that obtained in the present case was readily distinguishable from the five cases cited by the defendant because in the said five cases, there was the common underlying fact that the parties had entered into contingent agreements with clauses providing for termination in the event the contingent event became impossible and/or could not be satisfied. In the said five cases, the contingent event was not fulfilled, and hence ss 32 and 33 of the Contracts Act 1950 were applied to hold the respective agreements void (see paras 21 & 23–24).

(4) The court opined that by securing a tenant, it must be understood or implied to mean that a tenancy agreement was made between the defendant and the party introduced by the plaintiff. As it turned out,

from the evidence of Daehan's director ('PW3'), it was proved that Alih did take up a tenancy from one company within the defendant's group of companies, namely Resort Villa, and that Alih decided to form Daehan as a special purpose vehicle to enter into a tenancy agreement with Resort Villa. In the court's considered view, if the particulars of the potential tenant came through the estate agent, the estate agent would be entitled to his fees. It would be inequitable, unconscionable and unjust for the defendant to raise the veil of corporate entity, and hide behind it to avoid payment to the plaintiff who was the effective cause of bringing the parties together which resulted in the making of the tenancy agreement between Daehan and Resort Villa (see paras 28, 35 & 37).

(5) The defendant's argument that PW3's evidence was inadmissible and was privileged from disclosure pursuant to s 126 of the Evidence Act 1950 was devoid of merit because, the privilege belonged to the client and it was for the client to claim the same. And, it was indisputable that the defendant was not the client of PW3. Put in another way, the defendant did not have the locus standi to claim such a privilege. Even if privilege had been claimed, PW3's testimony would still be admissible because it was relevant, and for the defendant to seek to suppress the same would amount to it being used to commit a fraud or an equitable fraud against the plaintiff, and such evidence would be admissible under the exceptions provided by s 126 of the Evidence Act 1950 (see paras 41, 43 & 47).

(6) Based on the evidence, the plaintiff and PW1 were duly licensed for the years 2015 and 2016. When the licenses were produced by PW1, he was not cross-examined at all as to whether the date of the issuance of the license represented the date of the payment of the prescribed fees by the plaintiff and him. If he had been cross-examined, he may have a reasonable reason to offer such as that the delay in the issuance of the license was due to the administrative workings of the issuing authority. Further, for the defendant to take issue on the narrow gap between 1 January 2016 until 22 April 2016 when the relationship between the plaintiff and the defendant had commenced in late December 2015 was in the court's considered view a desperate act to seek to avoid liability which should be rejected in principle (see paras 49 & 51–52).

(7) A careful study of Act 242 revealed that there was no provision to say that such an alleged breach would invalidate the agreement arrived at between the real estate agent and his client. Thus, the court was guided by the trend laid down by the Federal Court in *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 that the common law courts ought to be slow to strike down commercial contracts for illegality. To allow it to defeat the plaintiff's claim would be wholly disproportionate to the alleged infraction of the licensing requirements. In other words, in the circumstances of the present case, even if there was

an infraction of licensing requirements, for which there was no compelling evidence, the court was of the view that the relief should not be denied the plaintiff who had in fact obtained a license for the years 2015 and 2016. Further, the justice of the present case demanded that the court should not countenance such a challenge by the defendant (see paras 54–56).

[Bahasa Malaysia summary

Plaintif adalah ejen harta tanah yang berlesen dengan Lembaga Penilai, Pentaksir dan Ejen Harta Tanah mengikut peruntukan Akta Penilai, Pentaksir, Ejen Harta Tanah dan Pengurus Tanah 1981 ('Akta 242') manakala defendan adalah sebuah syarikat tersenarai awam yang mempunyai berbilang anak syarikat termasuk Resort Villa Development Sdn Bhd ('Resort Villa') yang merupakan pemilik bagi hartanah yang dikenali sebagai IOI Square 2 ('premis tersebut') dan Puchong Financial Corporate Centre ('PFCC'). Dalam kes semasa, plaintif mendakwa bahawa ia telah memperkenalkan satu bakal penyewa yang dikenali sebagai Alih Venture Sdn Bhd ('Alih') kepada defendan dan Alih telah menubuhkan satu syarikat bertujuan khas dikenali sebagai Daehan Rehabilitation Services Sdn Bhd ('Daehan') untuk memeterai perjanjian penyewaan dan perjanjian penyewaan tambahan dengan Resort Villa berhubung dengan premis tersebut. Tuntutan plaintif adalah untuk yuran agensi harta tanahnya, iaitu, jumlah yang bersamaan dengan 1.5 bulan daripada sewa kasar yang perlu dibayar bersama dengan 6% Cukai Barang dan Perkhidmatan ('GST') seperti yang dipersetujui antara pihak-pihak. Isu-isu yang perlu ditentukan dalam kes semasa adalah seperti berikut: (a) pliding — sama ada pliding plaintif mencukupi untuk menjelaskan kausa tindakannya; (b) kepastian kontrak — sama ada kontrak yang dibuat di antara plaintif dan defendan adalah pasti tentang terma, harga dan hal perkaranya dan bergantung kepada perjanjian penyewaan yang ditandatangani antara defendan dan Alih atau ia boleh dibuat antara Daehan dan Resort Villa — berhubung dengan isu ini, defendan menegaskan bahawa plaintif dalam surat tuntutannya bertarikh 20 September 2019 telah meminta bayaran bagi yuran yang dikatakan perlu dibayar pada tarikh yang bercanggah dengan tarikh permulaan perjanjian penyewaan antara Daehan dan Resort Villa; (c) punca sebenar — sama ada plaintif adalah punca sebenar perjanjian penyewaan yang ditandatangani antara Daehan dan Resort Villa; dan (d) kepenyalahan undang-undang — sama ada kontrak tersebut, jika ada, adalah menyalahi undang-undang, melanggar dasar awam, melanggar statut termasuk Akta 242 dan Kaedah-Kaedah Penilai, Pentaksir dan Ejen Harta Tanah 1986 — berkenaan dengan isu ini, defendan menegaskan bahawa antara 1 Januari 2016 hingga 21 April 2016, plaintif tidak mempunyai lesen dan dengan itu, plaintiff tidak boleh beramal.

Diputuskan, membenarkan tuntutan plaintif dengan kos yang dipersetujui

berjumlah RM30,000 tertakluk kepada alokatur yang perlu dibayar oleh defendan kepada plaintif:

(1) Pada pandangan mahkamah, pliding plaintif adalah mencukupi untuk memaklumkan defendan tentang perkara yang dituntut oleh plaintif iaitu, yuran profesionalnya untuk penyewa (Alih atau syarikat bertujuan khasnya, Daehan) yang telah diperkenalkan kepada defendan yang membawa kepada perjanjian penyewaan yang dimeterai ke atas hartanah yang dimiliki dalam kumpulan syarikat defendan. Oleh itu, mahkamah mendapati aduan defendan bahawa pliding tidak mencukupi adalah tidak bermerit (lihat perenggan 10–11).

(2) Dalam kes semasa, hartanah yang akan dipasarkan adalah pasti, iaitu hartanah milik kumpulan syarikat defendan termasuk PFCC dan IOI Square 2. Selanjutnya, telah dipersetujui antara pihak-pihak bahawa yuran profesional ditetapkan pada kadar 1.5 bulan sewa kasar ditambah 6% GST, oleh itu, kontrak tersebut adalah pasti berkenaan kadar bayaran profesional yang perlu dibayar (lihat perenggan 12 & 14–15).

(3) Berdasarkan keterangan, rundingan telah dijalankan secara langsung antara Alih dan defendan. Oleh itu, bagi defendan untuk menumpukan kepada fakta remeh-temeh mengenai tarikh yang mana adalah tarikh akhir, sedangkan ia secara khusus berada dalam pengetahuannya, adalah tidak bermerit kerana plaintif tidak dimaklumkan tentang rundingan ini walaupun telah memaklumkan kepada defendan bahawa plaintif tersedia untuk memberikan apa-apa penjelasan. Apa yang jelas ialah perjanjian penyewaan dan perjanjian penyewaan tambahan tersebut telah menjadi pasti dan tidak bersyarat pada 1 September 2018 pada masa plaintif memfailkan samannya pada 28 November 2019. Matriks fakta yang diperolehi dalam kes semasa dengan mudah dapat dibezakan daripada lima kes yang dipetik oleh defendan kerana dalam lima kes tersebut, terdapat fakta yang sama iaitu pihak-pihak telah memasuki perjanjian kontinjen yang mempunyai klausa yang memperuntukkan tentang penamatan sekiranya peristiwa kontinjen menjadi mustahil dan/atau tidak dapat dipenuhi. Dalam lima kes tersebut, peristiwa kontijen tidak dipenuhi, dan oleh itu ss 32 dan 33 Akta Kontrak 1950 telah digunakan untuk memutuskan bahawa perjanjian-perjanjian yang berkaitan adalah terbatal (lihat perenggan 21 & 23–24).

(4) Mahkamah berpendapat bahawa dengan mendapatkan penyewa, ia harus difahami atau secara tersirat bermaksud bahawa perjanjian penyewaan telah dibuat antara defendan dan pihak yang diperkenalkan oleh plaintif. Ternyata, daripada keterangan pengarah Daehan ('PW3'), terbukti bahawa Alih telah mengambil penyewaan daripada salah satu syarikat dalam kumpulan syarikat defendan, iaitu Resort Villa, dan bahawa Alih memutuskan untuk membentuk Daehan sebagai syarikat bertujuan khas untuk memeterai perjanjian penyewaan dengan Resort

Villa. Pada pandangan mahkamah, jika butir-butir penyewa yang berpotensi datang melalui ejen harta tanah, ejen harta tanah tersebut akan berhak menerima bayarannya. Adalah tidak saksama, tidak bertimbang rasa dan tidak adil bagi defendan untuk membangkitkan tabir entiti korporat, dan berselindung di sebaliknya untuk mengelakkan pembayaran kepada plaintif yang merupakan punca sebenar yang mempertemukan pihak-pihak yang akhirnya membawa kepada pemeteraian perjanjian penyewaan antara Daehan dan Resort Villa (lihat perenggan 28, 35 & 37).

(5) Hujah defendan bahawa keterangan PW3 tidak boleh diterima dan diberi keistimewaan daripada penzahiran menurut s 126 Akta Keterangan 1950 adalah tidak mempunyai merit kerana, keistimewaan tersebut adalah milik anak guam dan ia adalah hak anak guam menuntut perkara yang sama. Dan, tidak dapat dinafikan bahawa defendan bukanlah anak guam PW3. Dengan kata lain, defendan tidak mempunyai locus standi untuk menuntut keistimewaan tersebut. Jikapun keistimewaan telah telah dituntut, keterangan PW3 masih boleh diterima kerana ia adalah relevan, dan perbuatan defendan yang cuba untuk menyekat perkara yang sama akan bermakna ia digunakan untuk melakukan penipuan atau penipuan yang saksama terhadap plaintif, dan keterangan sedemikian boleh diterima di bawah pengecualian yang diperuntukkan oleh s 126 Akta Keterangan 1950 (lihat perenggan 41, 43 & 47).

(6) Berdasarkan keterangan, plaintif dan PW1 mempunyai lesen yang sewajarnya bagi tahun 2015 dan 2016. Apabila lesen tersebut dikemukakan oleh PW1, dia langsung tidak disoal balas sama ada tarikh pengeluaran lesen tersebut mewakili tarikh pembayaran yuran yang ditetapkan oleh plaintif dan dirinya. Jika dia disoal balas, dia mungkin mempunyai alasan yang munasabah untuk ditawarkan seperti kelewatan pengeluaran lesen adalah disebabkan oleh kerja pentadbiran pihak berkuasa yang mengeluarkan lesen tersebut. Selanjutnya, tindakan defendan yang mempersoalkan mengenai tempoh yang sempit antara 1 Januari 2016 hingga 22 April 2016 sedangkan hubungan antara plaintif dan defendan telah bermula pada akhir Disember 2015 adalah pada pandangan mahkamah merupakan tindakan terdesak untuk mengelakkan dirinya daripada liabiliti yang sememangnya patut ditolak pada dasarnya (lihat perenggan 49 & 51–52).

(7) Penilitian secara menyeluruh ke atas Akta 242 mendedahkan bahawa tidak ada peruntukan di dalamnya yang mengatakan bahawa pelanggaran sedemikian akan membatalkan perjanjian yang dicapai antara ejen harta tanah dan kliennya. Oleh itu, mahkamah mengambil panduan daripada trend yang ditetapkan oleh Mahkamah Persekutuan dalam *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance*

Bhd [1999] 3 MLJ 81 bahawa mahkamah 'common law' sepatutnya lambat untuk membatalkan kontrak komersial disebabkan oleh kepenyalahan undang-undang. Untuk membenarkannya mengalahkan tuntutan plaintif adalah tidak seimbang sepenuhnya dengan dakwaan pelanggaran keperluan pelesenan. Dalam erti kata lain, dalam keadaan kes semasa, walaupun terdapat pelanggaran keperluan pelesenan, yang tidak mempunyai bukti yang kukuh, mahkamah berpendapat bahawa relif tersebut tidak sepatutnya dinafikan kepada plaintif yang sebenarnya telah memperoleh lesen untuk tahun 2015 dan 2016. Tambahan pula, keadilan kes semasa menghendaki bahawa mahkamah tidak membenarkan cabaran sedemikian oleh defendan (lihat perenggan 54–56).]

Cases referred to

Addlesee and others v Dentons Europe llp [2020] Ch 243, CA (refd)

Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1; [2011] 4 AMR 101; [2012] 5 MLRA 505; [2011] CLJU 232, CA (refd)

Dato' Anthony See Teow Guan v See Teow Chuan & Anor [2009] 3 MLJ 14; [2009] 3 CLJ 405; [2009] 1 MLRA 248, FC (distd)

Dato' Gopal Sri Ram v Dato' C Vijaya Kumar & Ors [2006] 6 MLJ 328; [2006] 6 MLRH 7; [2006] CLJU 377, HC (refd)

Detik Ria Sdn Bhd & Anor v Prudential Corp Holding Ltd & Anor [2022] 5 MLJ 541; [2022] 10 CLJ 171; [2022] 7 AMR 669, CA (refd)

Green v Bartlett (1863) 143 ER 613 (folld)

Loke Kooi Chuan Properties Sdn Bhd v Lee Kwee Foh Sdn Bhd & Ors [2022] MLJU 2007; [2022] CLJU 1942; [2022] MLRHU 1707, HC (refd)

Lori (M) Bhd (interim receiver) v Arab-Malaysia Finance Bhd [1999] 3 MLJ 81; [1999] 2 CLJ 997; [1999] 3 AMR 3161; [1999] 1 MLRA 274, FC (folld)

Markem Corporation and another v Zipher Ltd Markem Technologies Ltd and others v Buckby and others [2005] EWCA Civ 26; [2005] RPC 761, CA (refd)

National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211; [1983] 2 CLJ 76; [1983] 1 MLRA 127, FC (refd)

Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors [2021] 3 MLJ 622; [2021] 4 CLJ 821; [2021] 4 MLRA 211, FC (folld)

Propnex Realty Sdn Bhd v Small Medium Enterprise Development Bank Malaysia Bhd [2023] MLJU 1885; [2023] 9 CLJ 639, HC (refd)

R (Morgan Grendell & Co Ltd) v Special Commissioner of Income Tax and another [2003] 1 AC 563, QBD (refd)

R v Derby Magistrates' Court, ex parte B; and another appeal [1996] AC 487, HL (distd)

St John Shipping Corporation v Joseph Rank Ltd [1956] 3 All ER 683, QBD (refd)

Summit Domain Sdn Bhd & Anor v Carillon Sdn Bhd [2020] 2 MLJ 96; [2020]

2 CLJ 329; [2019] 8 AMR 752; [2019] MLRAU 385, CA (refd)
Tan Chong Kean v Yeoh Tai Chuan & Anor [2018] 2 MLJ 669; [2018] 3 CLJ 294; [2018] 1 AMR 417; [2018] 2 MLRA 95, FC (distd)
Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals [2021] 3 MLJ 914; [2021] 2 CLJ 318; [2021] 2 AMR 52; [2021] 2 MLRA 333, FC (refd)
Tang Chiok Sing v Lian Fatt Sawmill Co [1976] 2 MLJ 241; [1976] 1 MLRA 267; [1976] 1 LNS 155, FC (refd)
Tenaga Nasional Bhd v Big Man Management Sdn Bhd [2024] 2 MLJ 652; [2024] 2 CLJ 775; [2024] 2 MLRA 783; [2023] AMEJ 2759, CA (refd)
TH Properties Sdn Bhd & Anor v Knight Frank Malaysia Sdn Bhd [2021] MLJU 202; [2021] MLRHU 1552; [2021] CLJU 134, HC (refd)
YKL Engineering Sdn Bhd v Sungei Kahang Palm Oil Sdn Bhd & Anor [2022] 6 MLJ 1; [2022] 8 CLJ 32; [2022] 6 MLRA 305; [2022] 6 AMR 373, FC (refd)
Zainon bt Noordin lwn Dwiprofil (M) Sdn Bhd dan lain-lain [2023] MLJU 587, CA (refd)
Zerin Properties v Naza TTDI Sdn Bhd [2019] 5 MLJ 300; [2020] 1 MLRA 362; [2019] 1 LNS 784, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016)
Contracts Act 1950 ss 32, 33, 184(a)
Evidence Act 1950 ss 114(g), 126
Valuers, Appraisers and Estate Agents Rules 1986
Valuers, Appraisers, Estate Agents and Property Managers Act 1981 s 16, 16(2)

Dhanaraj a/l Vasudevan (with Malar a/p Loganathan and Andrew Navin a/l Anthony John (Pupil in Chambers)) for the appellant.
Rishwant Singh a/l Amarjeet Singh (with Nur Fathin Farrisya bt Md Noor (Pupil in Chambers)) for the respondent.

Su Tiang Joo J:

INTRODUCTION

[1] The plaintiff's claim for real estate agency fees was allowed after a full trial. This court found that the plaintiff was the effective cause for a tenancy agreement entered into between one of the defendant's subsidiary company and a special corporate vehicle set up by the party introduced by the plaintiff. Dissatisfied, the defendant appealed, and these are the full grounds for the decision made on 15 November 2024.

THE PLAINTIFF'S CLAIM

[2] The plaintiff claims from the defendant real estate agency fees to the sum of RM1,233,215.13 ('the said sum') made up of a sum of RM1,163,410.50 being its commission plus a sum RM69,804.63 being the 6% GST to be paid within 14 days from the date of judgment together with interest thereon at 5%pa from the date the tenancy agreement between Daehan Rehabilitation Services Sdn Bhd ('Daehan') and Resort Villa Development Sdn Bhd ('Resort Villa') became unconditional, which is agreed to be 1 September 2019, until one day before the date of judgment, and interest at 5%pa on the judgment sum including pre-judgment interest calculated from the date of judgment until the date of full realisation and costs.

[3] The said sum represents an amount equivalent to 1.5 months of the gross rental payable under a tenancy agreement made between Daehan and Resort Villa.

AGREED FACTS

[4] Between the parties, the following facts are agreed:

(a) the plaintiff is a company incorporated in Malaysia pursuant to the Companies Act 1965, and having its registered address at 39–2, 2nd Floor, Wisma CKL, Jalan 23/70A Desa Sri Hartamas, 50480 Kuala Lumpur; and

(b) the defendant, 101 Properties Group Bhd, is a public limited company incorporated in Malaysia pursuant to the Companies Act 1965.

ISSUES TO BE TRIED

[5] Although eight issues were formulated by the parties to be tried, in my considered view they can be distilled into the following four main issues:

(a) pleadings — whether the plaintiff's pleadings are sufficient to make out its cause of action;

(b) certainty of contract — whether the contract made between the plaintiff and the defendant is certain as to its terms, price and subject matter and contingent upon a tenancy agreement ('TA') being made between the defendant and Alih Venture Sdn Bhd ('Alih') or it can be one made between Daehan and Resort Villa;

(c) effective cause — whether the plaintiff is the effective cause of the TA made between Daehan and Resort Villa; and

(d) illegality — whether the contract, if any, is illegal, in breach of public

policy, in breach of statute including the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ('the Act') and the Valuers, Appraisers and Estate Agents Rules 1986 ('the Rules'). A

Pleadings

B

[6] The defendant challenged the pleadings filed by the plaintiff as being insufficient for the following reasons:

(a) lacking in setting out the entire terms of the contract, for not setting out whether it was wholly in writing or both oral and in writing or entirely oral, when did it come into existence; C

(b) when were all the terms of the contract performed by the plaintiff as to entitle it to full payment;

(c) that there was no plea that the plaintiff was the effective cause of the TA made between Daehan and Resort Villa; D

(d) that the words 'effective cause' was not pleaded; and

(e) that the defendant is to be liable if its subsidiary, Resort Villa, were to enter into the TA with Alih or Alih's subsidiary or a sister company of Alih. In other words that the defendant is to be liable even Resort Villa were to enter into a TA with Daehan instead of Alih, Alih's subsidiary or its sister company. E

[7] From a perusal of the pleadings filed by the plaintiff, in particular, the statement of claim ('SOC') ('A' at pp 13–19) and the amended reply (A at pp 58–63), the following were pleaded: F

(a) that the plaintiff is a licensed Estate Agent with the Board of Valuers, Appraisers and Estate Agents in accordance with the provisions of the Act — para 2 SOC; G

(b) on a regular basis the Marketing Department of the defendant emails the plaintiff and other real estate companies, a list of the defendant's properties which are available for rent and or sale — paras 4 SOC and para 2(a) amended reply; H

(c) the defendant had through its senior leasing executive, Karen Chin Yen Ling ('Karen'), approached the plaintiff to introduce the property known as Tower 5 Puchong Financial Corporate Centre to the plaintiff's prospective tenants to be let out *en bloc* — paras 4(a) and 5(ii) SOC; I

(d) on 16 December 2015, the plaintiff's representative sent by way of email the plaintiff's letter of appointment to Karen saying it has a foreign multi-national company seeking to rent/lease a commercial facility for a term of 15 years with facility requirement of about 300,000sqft ('the

prospective tenant') — para 4(b) SOC;

(e) in the same letter of appointment, the plaintiff said in the event of a successful rental transaction, the plaintiff's professional fee payable by the defendant shall be based on 2.5 months gross rental — para 4(c) SOC;

(f) however, after much negotiations, the plaintiff agreed to the defendant's request to pay the plaintiff's professional and/or introductory fees and commission of 1.5 months of the gross rental ('said commission') payable for tenants introduced by the defendant (sic) for *any of its properties within its group of companies*. Based on this agreement by the defendant to pay the plaintiff the said commission, the plaintiff sourced prospective tenants for the defendant — para 4(d) SOC;

(g) the plaintiff came to know of a company known as Alih Ventures Sdn Bhd (Company No 301871-H (old) 199401016191 (new) ('prospective tenant-Alih') which was looking for a suitable premise for leasing to set up a Korean Rehabilitation Hospital — para 5(a) SOC;

(h) the plaintiff then contacted Karen with the requirements of the prospective tenant. Ms Karen confirmed that they have the buildings within their group that can accommodate the prospective tenant-Alih's requirement — para 5(b) SOC;

(i) as such the plaintiff arranged a viewing of one of the defendant's property known as PFCC on 15 December 2015 (first viewing') with the prospective tenant-Alih. The defendant's representative conducted the viewing with the plaintiff's representatives and the prospective tenant-Alih's representatives — para 5(c) SOC;

(j) after this first viewing, the plaintiff met up with Karen for the building plans for PFCC and the defendant forwarded part of the building plans and also forwarded the IOI Square 2 leasing kit to the plaintiff on 5 January 2016 — para 5(d) SOC;

(k) on 22 February 2016 the plaintiff's representatives met with Chief Operating Officer of the defendant, Cheah Wing Choong, where the plaintiff and the defendant once again confirmed the said commission for a successful introduction of a tenant of its buildings — para 5(e) SOC;

(l) on 23 February 2016 the plaintiff once again arranged for a viewing of PFCC ('second viewing') with the prospective tenant-Alih as one of the directors of the prospective tenant-Alih wanted to view the premises. After this second viewing, parties also arranged for a viewing of the defendant's premises at IOI Square 2, Putrajaya — para 5(f) SOC;

(m) on 24 February 2016, the plaintiff forwarded the company profile of the prospective tenant-Alih and asked once again for the building plans of PFCC — para 5(g);

(n) on 1 March 2016, the defendant once again confirmed that it will pay the plaintiff its fees as agreed — para 5(h) SOC;

(o) on 3 March 2016, the plaintiff brought the prospective tenant-Alih to the defendant's premises at IOI Square 2 to view the premises ('third viewing'). The defendant conducted the viewing. At this viewing the prospective tenant-Alih also asked for further information from the defendant — para 5(i) SOC;

(p) on 4 March 2016, the plaintiff forwarded the documents requested to the prospective tenant-Alih — para 5(j) SOC.

(q) the plaintiff pleads that upon the introduction of said prospective tenant-Alih to the defendant, the plaintiff had entrusted the defendant and in good faith had left the defendant to deal with the said prospective tenant-Alih directly to fine tune terms of the tenancy agreement as the plaintiff's role as an agent was only to introduce prospective tenants to the defendant — para 6 SOC;

(r) thereafter, the plaintiff was informed by the prospective tenant-Alih that it will form another company known as Daehan Rehabilitation Services Sdn Bhd (Company No 1193842-P (old) 201601022903 (new) ('prospective tenant-Daehan') to enter into the tenancy agreement with the defendant for IOI Square 2, Putrajaya — para 7 SOC;

(s) it has come to the plaintiff's knowledge that the defendant has entered into a tenancy agreement with the said prospective tenant-Daehan for IOI Square 2, Putrajaya. However, the defendant did not disclose the same to the plaintiff and the defendant had failed and/or refused and/or neglected to pay the plaintiff the said commission — para 8 SOC;

(t) the plaintiff pleads that it is entitled for (sic) the professional and/or introductory fees of the prospective-tenant-Alih/prospective tenant-Daehan as the plaintiff had completed and concluded its role as an agent by securing the said prospective tenant-Alih/prospective tenant-Daehan to rent from the defendant — para 9 SOC;

(u) however, despite numerous requests made by the plaintiff, the defendant has continued to refuse, failed and or neglected to pay the commission — para 10 SOC;

(v) therefore, the plaintiff is seeking from this honourable court, judgment against the defendant, the following:

(i) the defendant to pay the plaintiff the agreed commission amounting to 1.5 months of the gross rental of its tenancy agreement with Daehan Rehabilitation Services Sdn Bhd (Company No 1193842-P (old) 20160102903 (new)), within 14 days from the date of judgment;

(ii) interest at the rate of 5%pa calculated from the date of the tenancy agreement Daehan Rehabilitation Services Sdn Bhd (Company No 1193842-P (old) 20160102903 (new) until the date of the filing of this writ of summons ('judgment sum');

(iii) interest at the rate of 5%pa on the judgment sum calculated from the date of judgment until date of full realisation;

(iv) general damages;

(v) costs of this action; and

(vi) any other reliefs deemed fit and reasonable by this honourable court — para 13 SOC

[8] In *YKL Engineering Sdn Bhd v Sungei Kahang Palm Oil Sdn Bhd & Anor* [2022] 6 MLJ 1; [2022] 8 CLJ 32; [2022] 6 MLRA 305; [2022] 6 AMR 373 (FC) the Federal Court held as follows:

> [35] Undeniably, in our jurisdiction, unlike others such as the United Kingdom, Australia and Singapore, there are no specific provisions, whether in the PA 1983 and the Patents Regulations 1986 that require a party to plead with specificity the prior art a party intends to rely on to invalidate a patent for lack of novelty or otherwise. The questions therefore fall to be decided by reference to the Rules of Court 2012 ('the ROC 2012'). *The order of the ROC 2012 which governs the general principles of pleadings is O 18 r 7(1). This rule lays down the requirements of the pleading, namely that pleadings should be statements in summary form, stating only the material facts in a manner which is brief and to the point, and not the evidence by which they are to be proved* (see *Malaysian Civil Procedure 2021* (Sweet & Maxwell, Vol 1) para 18/7/1). *Material facts are facts which are necessary for the purpose of formulating a complete cause of action and for establishing a defendant's defence* (see *Bruce v Odhams Press Ltd* [1936] 1 All ER 287).

[9] Further more, in *Dato' Gopal Sri Ram v Dato' C Vijaya Kumar & Ors* [2006] 6 MLJ 328; [2006] 6 MLRH 7; [2006] CLJU 377 (HC) the High Court held:

> In essence, O 18 r 7(1) requires a party to write his pleading in the form of a skeletal statement of fact sufficient to identify the matters complained of and to enable him to establish his case at the trial based on what he pleads. All matters of evidence to prove his case are to be reserved for the trial and must not be pleaded.
>
> ...
>
> A strong bench of the Federal Court (Raja Azlan Shah, Wan Sulaiman and Syed Othman FCJJ) approved of what the High Court judge said in allowing the respondent's application to strike out the offending paragraph. This was what His Lordship said:
>
> > It is true that a substantial part of the particulars are matters which may be properly set out but the particulars that are clearly evidence and which strictly

> should not appear and ought to be struck out seem to occupy a greater portion of those particulars. ... Fundamentally she had gone beyond what is required by the proviso of O 19 r 22 particularly in the light of r 4 which provides that only the material facts must be pleaded but not evidence by which they are to be proved.
>
> I can think of at least two reasons why the fundamental rule of pleading requires only concise facts be pleaded and not evidence. First, in an action begun by writ in the adversarial system of justice a pleading as Lord Hoffmann said in *Barclays Bank v Boulter* [1999] 1 WLR 1919 at p 1923 '*is meant to define the issues and give the other party fair notice of the case he has to meet*'. The judge plays a purely non partisan role of a referee whose mind must be kept pure and free from any prejudice and prejudgment until he sits at the trial and hears evidence. By pleading evidence rather than a concise statement of fact, there is a likelihood of compromising the neutrality of the judge consciously or subconsciously before he gets to hear the evidence.
>
> Second, a pleading is a privileged public document to which the public has access. The facts stated therein are purely allegations and counter allegations the truth of which may only be ascertained after evidence is presented and assessed by the judge. A statement by a party purporting to state therein evidence rather than concise fact may well be erroneously assumed to be true by others.

[10] In my considered view, the pleadings are sufficient to put the defendant on notice of what the plaintiff is claiming ie its professional fees for the tenant (Alih or its special purpose vehicle, Daehan) it has introduced to the defendant leading to a tenancy agreement entered over a property owned within the defendant's group of companies.

[11] Wherefore, I find the defendant's complaint about the pleadings being insufficient to be devoid of merit.

Certainty of contract

[12] The properties to be marketed are certain, namely, properties of the defendant's *group of companies* including the PFCC and the IOI Square 2, particulars of which were given by the defendant itself, with the viewing of these two properties undertaken by representatives of the plaintiff, defendant and Alih.

[13] From the exchange of emails between the plaintiff and the defendant's Senior Leasing Executive by the name of Karen, it was the latter who gave the particulars of the target properties namely PFCC and IOI Square 2. Nowhere in these emails was there any mention or reservation that any of these properties do not belong to the defendant (CBOD B pp 28–29, 33, 37–38, 41 and 43).

[14] After much negotiations, the proposed professional fees was reduced from 2.5 months of gross rental to a fixed sum of RM2.5m and finally agreed between the plaintiff and defendant to be pegged at 1.5 months of gross rental plus 6% Goods and Services Tax ('GST').

[15] As between the plaintiff and the defendant, the contract is, thus, certain on its rate of professional fees to be payable (CBOD B pp 40 and 45).

[16] However, the defendant (encl 66 para 157) pointed to an email issued by Ignatius Charles ('PW2'), who is the plaintiff's real estate negotiator, and dated 11 March 2016 (CBOD B pp 45–46). This email says that Alih is in the midst of negotiating the terms of the tenancy/lease and that the plaintiff's fees will be payable upon the execution of a TA between the defendant and Alih. The defendant, thus, asserts that the contract between the plaintiff and the defendant anticipates a TA to be entered into between the defendant and Alih (encl 66 para 156). As it turned out, no such TA was signed. Instead, the TA was made between Daehan and Resort Villa.

[17] Thus, D asserts that the contingent event of there being a concluded contract between the defendant and Alih, having not come to pass, the contract, if any, between the defendant and the plaintiff is unenforceable and, has become void with reference made to ss 32 and 33 of the Contracts Act 1950. The provisions of ss 32 and 33 are set out hereunder:

> Section 32 Contingent contract
>
> A 'contingent contract' is a contract to do or not to do something, if some event, collateral to the contract, does or does not happen.
>
> Section 33 Enforcement of contracts contingent on an event happening
>
> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.
>
> ILLUSTRATIONS
>
> (a) A makes a contract with B to buyB's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
>
> (b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.
>
> (c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

[18] The following cases on the trite principles on contingent contracts were cited by the defendant in support of this assertion (encl 66 pp 155–156):

(a) *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211; [1983] 2 CLJ 76; [1983] 1 MLRA 127 (FC);

(b) *Summit Domain Sdn Bhd & Anor v Carillon Sdn Bhd* [2020] 2 MLJ 96; [2020] 2 CLJ 329; [2019] 8 AMR 752; [2019] MLRAU 385 (CA);

(c) *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1; [2011] 4 AMR 101; [2012] 5 MLRA 505; [2011] CLJU 232 (CA);

(d) *Detik Ria Sdn Bhd & Anor v Prudential Corp Holding Ltd & Anor* [2022] 5 MLJ 541; [2022] 10 CLJ 171; [2022] 7 AMR 669 (CA); and

(e) *Zainon bt Noordin lwn Dwiprofil (M) Sdn Bhd dan lain-lain* [2023] MLJU 587 (CA).

[19] From the evidence led, I find that:

(a) the property tenanted by Daehan from Resort Villa pursuant to the TA and supplemental TA executed between them is in IOI Square 2 (CBOD B pp 102–144 and pp 145–152) (the 'demised premises');

(b) the demised premises is the same property which was shown by the plaintiff's Senior Leasing Executive (Karen), to the representatives of the defendant, and Alih;

(c) Resort Villa is part of the group of companies of the defendant and, is in fact, wholly owned by the defendant (see CBD B p 99);

(d) Cheah Wing Choong ('DW1') who was the Chief Operating Officer in Property Investment of the defendant is a director of Resort Villa. He was the person who actively took part in the communications between the plaintiff and the defendant leading to the TA and the supplemental TA. He was copied in the emails between Karen and Nixon Dadon Harris ('PW1'), a real estate agent and a director of the plaintiff, and PW2.

(e) it is significant that DW1 was the very same person who had *on behalf of Resort Villa*, executed the TA and the supplemental TA made between Daehan and Resort Villa;

(f) the communications between Resort Villa and Daehan were done using the letterhead of *IOI Properties* (see CBOD B pp 85 and 87) leading to the inference that the defendant was at all times content to hold itself out and, to be held out as the owner of the demised premises and the party to be responsible for the professional charges payable;

(g) it was Karen, the Senior Leasing Executive of the defendant, who emailed the IOI Square plans to PW2 (CBOD B p 33) ie the plans of the demised

premises, and using her email address of karen.chin@ioiqroup.com;

(h) Karen had via her email from karen.chin@ioigroup.com dated 1 March 2016 *confirmed* that the commission payable would be 1.5 months of the gross rental payable (CBOD B p 45);

(i) it was Alih who had made the offer to rent from the defendant vide its letter dated 30 March 2016 *addressed to the defendant* (CBOD p 74) marked to the attention of DW1 entitled 'Letter Of Offer To Lease Two IOI Square, IOI Resort, 62502 Putrajaya';

(j) at no time did the defendant inform or alert the plaintiff that the demised premises belongs to Resort Villa;

(k) Jennifer Jayalalitha Chandran ('PW3') a director of Daehan and the transactional solicitor for Alih in the TA and supplemental TA gave evidence that right from the onset of the first viewing, Alih had the intention to incorporate a special purpose vehicle ('SPV') to enter into any TA it may enter into (NP encl 63 p 19) and, this was in fact done with Alih forming Daehan to enter into the TA with Resort Villa;

(l) as early as 4 July 2016, PW3 was appointed as a director of Daehan and the TA entered into between Daehan and Resort Villa was made one month later on 2 August 2016 and, in fact, she had on behalf of Daehan executed the supplemental TA with D to make the TA unconditional on 1 September 2019;

(m) at NP E63, PW3 said:

> No, because as I said for us, Alih Ventures and Daehan was the SPV, so therefore, it was one for us. We looked at it as one. So, if you see at that time, when this letter was issued, Daehan wasn't incorporated yet. Daehan was just incorporated just prior to the tenancy agreement. And at that time, if you see, we also addressed the letter to IOI Properties Group Berhad. We didn't even know which are the entity from IOI that was going to enter into the tenancy. So, at that time, it was just Alih and IOI. But eventually when we wanted to sign, I think just now you referred me to the tenancy, ok, IOI company was Resort Villa Development Sdn Bhd and we were Daehan Rehabilitation Services Sdn Bhd ....
>
> ...
>
> No, I just said if you look at p 74, IOI Properties Group Berhad was the offer made to.

[20] The defendant asserts that the plaintiff in its letter of demand of 20 September 2019 (encl 17 p 48) sought payment of fees said to be due on a date which is in conflict with the commencement date of the TA between Daehan and Resort Villa.

[21] From the evidence led, *the negotiations were undertaken directly between Alih and the defendant*. PW3 testified that this was due to the complexity of the tenancy (encl 63 pp 27–32 at pp 30 and 32) with approvals required from multiple agencies and authorities for the setting up of a medical centre. A

[22] The complexity of the tenancy was highlighted by the plaintiff in its letter as early as 13 January 2016 with this letter signed off by PW1 to the plaintiff marked to the attention of DW1 (CBOD p 34). B

[23] Thus, for the defendant to nitpick on a fact as to which date is the due date, when it is peculiarly within its knowledge, is to my mind devoid of merits as the plaintiff was not kept informed of these negotiations despite having informed the defendant that it is available for any clarification. C

[24] What is clear is that the TA and the supplemental TA had become certain and unconditional on 1 September 2018 by the time the plaintiff filed its suit on 28 November 2019 (encl 1). The factual matrix that obtained in this case is readily distinguishable from the aforesaid five cases cited by the defendant because in these five cases, there is the common underlying fact that the parties have entered into contingent agreements with clauses providing for termination in the event the contingent event becomes impossible and/or cannot be satisfied. In these five cases, the contingent event were not fulfilled, and hence ss 32 and 33 of the Contracts Act were applied to hold the respective agreements void. D E F

Effective cause

[25] I find the case of *TH Properties Sdn Bhd & Anor v Knight Frank Malaysia Sdn Bhd* [2021] MLJU 202; [2021] MLRHU 1552; [2021] CLJU 134 cited by the defendant (encl 66 para 174) on the principle of effective cause to be instructive. His Lordship, Anand Ponnudurai JC (now J) said as follows: G

> [13] On the issue of the applicable law in cases such as these where the estate agent is claiming for commissions due, the law appears to be trite in that in order to be entitled to commission/agency fees, the agent must establish and demonstrate that it was the effective cause of the transaction. Reference is made to the Singapore cases of *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR 230 which adopted the prima facie test of the causa causans for the sale as enunciated by CR Rajah JC in the case of *Grandhome Pte Ltd v Ng Kok Eng* [1996] 1 SLR(1) 14. The same principle of the agent needing to demonstrate that they were the effective cause of the transaction is applicable here as held by the Court of Appeal in the case of *Inch Kenneth Kajang Rubber Public Ltd Co v Tor Peng Sie (t/a Pacific Landmark Real Estate Agents)* [2014] 1 MLJ 118 which followed and adopted this *causa causans* approach as enunciated by the Federal Court in the case of *Chew Teng Cheong & Anor v Pang Choon Kong* [1981] 1 MLJ 298. H I

[26] In *TH Properties*, reference was made to the Court of Appeal case of *Zerin Properties v Naza TTDI Sdn Bhd* [2019] 5 MLJ 300; [2020] 1 MLRA 362; [2019] 1 LNS 784 where the facts are rather similar to the instant case, and digested at para 14 as follows:

> [14] There is also a recent decision of the Court of Appeal which facts are rather similar to the present. In the case *of Zerin Properties v Naza TTDI Sdn Bhd* [2019] 5 MLJ 300, the plaintiff therein was a licensed real estate agency and claimed for fees due for services rendered in bringing about a joint venture between the defendant and a third party to develop a plot of land. The plaintiff had arranged a meeting between the third party and the defendant on 22 July, 2014 to discuss the matter at which the third party confirmed its interest. Thereafter, nothing transpired further between the third party, the plaintiff and the defendant. About 17 months later, the plaintiff (agent) discovered from media publications that the defendant and the third party had formed a joint venture company to develop the said land. The plaintiff then demanded for its fees for work done in making the joint venture happen. The defendant denied that there was such an appointment nor that the agent was the effective cause. The agent failed in its claim in the High Court but in allowing its appeal, the Court of Appeal held that the agent was indeed the effective cause and that the company was merely trying to circumvent paying the rightful agents fee especially when it was the defendant who kept the plaintiff out of negotiations. The Court of Appeal held as follows at paras 37 to 39 of the judgment:
>
> > [37] *In Green v Bartlett, G, an auctioneer and estate agent, was instructed by B to sell an island by auction or otherwise. G put the island up for auction but the reserved price was not reached. Afterwards, T, who had attended the auction, asked G for and was given B's name. T then approached B direct to negotiate the purchase of the island. Before the eventual sale, B terminated G's authority to sell. The court held that G was the causa causans of the sale and was entitled to the commission*.
> >
> > [38] In the present case, the defendant argued that the plaintiff was not the 'effective nor immediate cause of the transaction being brought about' as there were no further discussions from 22 July 2014 until January 2016, the plaintiff's appointment had expired on or before February 2015 which was before the development rights agreement dated 29 January 2016 entered between TTDI KL Metropolis and Golden Suncity Sdn Bhd and there was a break in the purported appointment.
> >
> > [39] With respect we find there are no merits in the defendant's submission. We adopt what we have stated in paras 25–30 and 34 and the sub-paras thereunder on the sequence of events that transpired prior to and post 22 July 2014 meeting and the plaintiff's involvement and the defendant's conduct throughout till 13 August 2014 and thereafter till 29 January 2016 of the fact that there was complete silence from the defendant. *Applying the principle in Green v Bartlett, we are of the view that the plaintiff is entitled to their fees notwithstanding the expiry of the period of the appointment under LOA2 and whether or not the subsequent discussions between Hap Seng and the defendant had stalled and had purportedly revived later, these do not constitute a break in the chain of causation. Further based on the preceding authorities cited, what is material is whether on the facts and*

evidence, the plaintiff was the effective cause of the transaction which we answer in the affirmative.

[27] His Lordship Justice Anand Ponnudurai in *TH Properties* went on at para 15 to hold that:

> In my view, the above decision of Zerin Properties demolishes the appellant's contention that the fact that there was a lapse of time of 16 months from the time of the site visit by the plaintiff and the ultimate sale would mean that the plaintiff could not be the effective cause. In my view, notwithstanding that there was a lapse of time, it could still mean that the plaintiff was the effective cause.

[28] By securing a tenant, to my mind it must be understood or implied to mean that a TA is made between the defendant and the party introduced by the plaintiff. As it turned out, from the evidence led from PW3, it is proved that Alih did take up a tenancy from one company within the defendant's group of companies, namely Resort Villa, and that Alih decided to form a special purpose vehicle in the form of Daehan to enter into the TA with Resort Villa.

[29] From the evidence led from PW2, after the first viewing of PFCC, it was the defendant who sent to the plaintiff the leasing kit for IOI Square 2. As it turned out, the landlord of IOI Square 2 was Resort Villa, a subsidiary company of the D. At the risk of repetition, when this leasing kit was sent by Karen on behalf of the defendant to the plaintiff, there was no mention at all that this piece of property belonged to Resort Villa. In other words, the defendant had dealt with this property as if it were part of its stable of properties.

[30] It is indisputable that Resort Villa is part of the defendant's group of companies. For the defendant to seek to distance itself from its subsidiary company with the view to avoid paying the professional fees to the estate agent in such a circumstance would be dishonorable, unconscionable, unjust and inequitable. I find that the case of *TH Properties Sdn Bhd* cited by the defendant to be helpful to the plaintiff rather than the defendant.

[31] From the evidence led, the TA made between Daehan and Resort Villa commenced on 1 September 2019 (see CBOD B p 85 para 4 and encl 66 para 165). To underscore the point, it is telling that in its communications with Daehan, Resort Villa uses the letterhead of IOI Properties. Its letters were signed off by none other than DW1 who was the Chief Operations Officer (Property Investments) of the defendant (B p 85–86; 87–88). Thus, for the defendant to seek to shield itself behind the cloak of it being a separate corporate personality from that of Resort Villa is inequitable and unconscionable.

[32] See the Federal Court case of *Tang Chiok Sing v Lian Fatt Sawmill Co* [1976] 2 MLJ 241; [1976] 1 MLRA 267; [1976] 1 LNS 155 (FC) which held as follows:

> The appellants had claimed commission against the respondents under an agreement by which the respondents agreed to pay the appellant commission, entertainment and service fees if the appellant was successful in getting a Korean concern, Shin Fung (Borneo) Co to enter into a contract to extract and purchase timber from a concession area. The respondent firm had become defunct and the partners of the firm incorporated a limited company, the Lian Fatt Sawmill Co Ltd. to work in the concession area. Forest licences which had been issued to the firm were renewed in the name of the company. The company entered into the agreement with the Korean concern for the extraction and sale of timber in the concession area. The appellant claimed commission under the agreement with the firm. His claim was dismissed in the High Court and he appealed to the Federal Court.
>
> Held, allowing the appeal:
>
> (1) *once the appellant had brought the parties together he was entitled to his commission and it did not matter that in fact the Korean concern made the contract with the limited company and not the firm as the persons in control of the partnership and the limited company were the same;*
>
> (2) *the respondents were taking advantage of a device to try to evade payment of commission. Such a device should not be allowed to defeat the claim of an innocent party. Under the circumstances it would be inequitable for the partnership to refuse to pay commission.*

[33] The defendant sought to distinguish the case of *Zerin Properties v Naza TTDI Sdn Bhd* [2019] 5 MLJ 300; [2020] 1 MLRA 362; [2019] 1 LNS 784 (CA) in that the sale to the potential purchaser was to be with the company, the plaintiff had introduced namely Hap Seng *or its nominated subsidiaries*, a phrase or term which defendant asserted is absent in this case. With respect, this did not pose an insurmountable obstacle for the Federal Court to do justice in *Tang Chiok Sing v Lian Fatt Sawmill Co* where it held that what is important is that the persons in control are the same. In this case, the persons in control of both Daehan and Resort Villa are the same, namely, Alih and the defendant respectively, (see CBOD B p 92)

[34] See also *Propnex Realty Sdn Bhd v Small Medium Enterprise Development Bank Malaysia Bhd* [2023] MLJU 1885; [2023] 9 CLJ 639 (HC) where despite there being no letter of appointment, the court had no hesitation in holding that the appellant were the causa causans of the transaction, its efforts in introducing the buyer being the effective cause of the sale.

[35] However, the defendant asserts that it was DW1 who was the one who tried to salvage the deal with Alih (encl 66 para 178) where the deal was salvaged with DW1 contacting Mr Park, the principal of Alif and Daehan directly. However, in my considered view, just like in *Green v Bartlett* if the particulars of the potential tenant comes through the estate agent, the estate agent would be entitled to his fees.

[36] I observed that via the email of 11 March 2016 (CBOD p 45), PW2 had informed Karen 'Should you require any further assistance please call us'. Thus, the plaintiff has made itself available to render any assistance. As the parties found it more efficient to communicate with each other given the complexity of the proposed tenancy, for the defendant to complain that the defendant did not play its part despite it having introduced Alih, is in my considered view, self-serving and devoid of merits.

[37] It would be inequitable, unconscionable and unjust for the defendant to raise the veil of corporate entity, and hide behind it to avoid payment to the plaintiff who was the effective cause of bringing the parties together which resulted in the making of the TA between Daehan and Resort Villa.

[38] In *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* [2021] 3 MLJ 622; [2021] 4 CLJ 821; [2021] 4 MLRA 211 (FC) at paras 90–99, Her Ladyship, Nallini Pathmanathan FCJ delivered the unanimous decision of the Federal Court in an illuminating judgment on the position in Malaysia on the law on the piercing of the corporate veil. The Federal Court made it clear that the law allows the court to look behind the corporate personality to ascertain the true facts. On the facts of this case, the 'Concealment principle' as explained by Justice Nallini Pathmanathan FCJ at para 99(iii) and reproduced below would in my considered view apply as to allow this court to disregard or to look behind the corporate personality to ascertain the true facts to impose liability:

> Concealment principle
>
> (iii) The analysis in *Prest*, namely that the concealment principle does not in reality pierce the veil of incorporation, but allows the court to disregard or look behind the corporate personality to ascertain the true facts, ought to be considered for use and application in this jurisdiction. The reason is because after ascertaining the true facts concealed behind the corporate personality, it will enable a court to determine which legal principle of substantive law it will then utilise to determine whether liability subsists, or does not subsist, against a party to the dispute, on a given set of facts. This may involve the utilisation of the principles of agency or trusts or some other area of the law. Such application allows for a greater analysis of the basis on which liability is imposed, rather than simply stating that the corporate veil has been lifted and imposing liability on a party without explaining the legal basis for doing

so. It is also important to note that it does not engage the evasion principle such that the corporate veil is not pierced;

[39] On the facts of this case, it is evidently clear that the defendant has contracted with the plaintiff to secure tenants on behalf of Resort Villa to let out the demised premises without disclosing that Resort Villa was in fact the owner. In other words, the defendant has *concealed* the truth of the factual situation and by reason thereto, pursuant to s 184(a) of the Contracts Act 1950 which is reproduced hereunder, the plaintiff can claim against the plaintiff. In my considered view, the concealment principle as explained in *Ong Leong Chiou* would apply for this court to look behind the corporate personality of Resort Villa to impose liability on the defendant. Section 184(a) provides as follows:

> (a) If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

[40] From the evidence led, both oral and documentary, Karen, the senior leasing executive had played a major part leading to the appointment by the defendant of the plaintiff, and the amount of fees agreed to be paid. She was also the one who had on behalf of the defendant supplied the leasing kit of the properties including the demised premises to the plaintiff. The failure by the defendant to produce her as a witness led me to draw an adverse inference against the defendant pursuant to s 114(g) of the Evidence Act 1950 that if she had been produced, her evidence would have been unfavorable to defendant on what had been agreed and that at all times, that the demised premises belong to Resort Villa was not revealed to the plaintiff and instead had held out that the demised premises belong to the defendant.

Solicitor-client privilege

[41] At this juncture I will deal with this sub-issue. The defendant asserts that the evidence given by PW3 is inadmissible because she is giving testimony as a solicitor for Alih and Daehan and the evidence is privileged from disclosure pursuant to s 126 of the Evidence Act 1950 because she is not authorised to testify on behalf of Alih or Daehan (encl 66 paras 191–198).

[42] Section 126 of the Evidence Act 1950 provides as follows:

> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted

in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure —

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

[43] In my considered view, such an assertion is devoid of merits because, the privilege belongs to the client and it is for the client to claim the same. And, it is indisputable that the defendant is not the client of PW3. Put in another way, the defendant does not have the locus standi to claim such a privilege. The Federal Court in *Tan Chong Kean v Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669; [2018] 3 CLJ 294; [2018] 1 AMR 417; [2018] 2 MLRA 95, an authority relied upon by the plaintiff, held as follows:

[25] *The privilege belongs to the client* and not that of the solicitor (see: *B and others v Auckland District Law Society and another*). As such in Australia it is now statutorily called the 'client legal privilege' instead of 'legal professional privilege' (see: Australia Evidence Act 1995 (Commonwealth)). The solicitor is therefore legally obliged to protect not only any form of information he has obtained from the client but also all the advice he has given to the client.

[44] The defendant cited the following cases in support of its point on solicitor client privilege and assert that the evidence of PW3 ought not to be admitted:

(a) *R v Derby Magistrates' Court, ex parte B; and another appeal* [1996] AC 487 (HL);

(b) *Tan Chong Kean v Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669; [2018] 3 CLJ 294; [2018] 1 AMR 417; [2018] 2 MLRA 95 (FC);

(c) *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14; [2009] 3 CLJ 405; [2009] 1 MLRA 248 (FC);

(d) *R (Morgan Grendell & Co Ltd) v Special Commissioner of Income Tax and another* [2003] 1 AC 563; and

(e) *Addlesee and others v Dentons Europe llp* [2020] Ch 243 (CA).

[45] However, save for the cases of *R (Morgan Grendell Ltd)* and *Addlesee* a close look at these cases cited by the defendant will show that they are all readily

distinguishable as in each and every case, the privilege against admissibility was claimed by the client or the solicitors, and not a stranger to the solicitor-client relationship, like the defendant in this case. In *R (Morgan Grendell) Ltd*, the bank had properly claimed for legal professional privilege for its customer. In *Addlessee*, the solicitors claimed privilege over the communications they had with their client which has since been dissolved and the English and Wales Court of Appeal held that the privilege still attaches until and unless it is waived or overridden by statute, *the claim to the privilege by the solicitors* on behalf of their former client continued to subsist.

[46] Alih and Daehan who are the clients of PW3 did not claim the benefit of the professional privilege. In fact, PW3 is a director of Daehan, and when she gave testimony, no evidence was led from her by any of the learned counsel that Alih, Daehan or any of her clients have claimed or are claiming privilege over any of her testimony.

[47] Even if privilege had been claimed, her testimony would still be admissible because it is relevant, and for the defendant to seek to suppress the same would in my considered view amount to it being used to commit a fraud or an equitable fraud against the plaintiff, and such evidence would be admissible under the exceptions provided by s 126 of the Evidence Act 1950. In this regard, I observed that the defendant has not deemed it fit to notify the plaintiff of the TA entered into between Daehan and its wholly owned subsidiary, Resort Villa and, at the same time, seeks to evade payment of the professional fees due to the plaintiff which would amount to a fraud or an equitable fraud on the plaintiff.

Illegality — Licence

[48] The defendant claimed that the plaintiff ought not to be allowed its claim because it was not licensed to conduct the practice as a real estate agent as is required under the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ('the Act') read together with the Valuers, Appraisers and Estate Agents Rules 1986 ('the Rules') at the material time.

[49] The plaintiff led evidence to show that it has the requisite licenses. Copies of the licenses of both the P and PW1 were produced to attest to this fact (CBOD E pp 3–6). The licenses show that P and PW1 were duly licensed for the years 2015 and 2016.

[50] The defendant, however, sought to point out that the license for the year 2015 is *dated 9 April 2015*, and for year 2016 it is *dated 22 April 2016*. Therefore, the defendant asserts that between 1 January 2016 until 21 April 2016, the plaintiff is unlicensed and therefore not authorised to practice. It will

be recalled that the appointment of the plaintiff was towards the end of 2015 with the confirmation of the rates of estate agency fees agreed at 1.5 months of the gross rental in March 2016. Reliance was placed by the defendant upon s 16 of the Valuers, Appraisers, Estate Agents and Property Managers Act 1981, and in particular, s 16(2) which is reproduced hereunder:

> 16 Authority to practice
>
> (1) The Registrar shall, upon receipt of a fee prescribed by the Board with the approval of the Minister, issue to every applicant, whose application has been approved, an authority to practise in the form prescribed by the Board and subject to such conditions or restrictions as it may deem fit to impose.
>
> (1A) For the purposes of subsection (1), the authority to practise as an individual registered valuer, appraiser, estate agent or property manager shall be subject to the condition that the practice is in accordance with section 23.
>
> (2) *The authority to practise shall, subject to the provisions of this Act, expire on the 31st of December of the year in which it is issued and shall thereafter be renewable annually upon payment of the prescribed fee and upon the applicant satisfying and complying with such conditions* as may be prescribed by the Board.

[51] I observed that when the licenses were produced by PW1, he was not cross-examined at all as to whether the date of the issuance of the license represent the date of the payment of the prescribed fees by the plaintiff and him. If he had been cross-examined, he may have a reasonable reason to offer such as that the delay in the issuance of the license was due to the administrative workings of the issuing authority. I find the following excerpt from the Court of Appeal authority of *Tenaga Nasional Bhd v Big Man Management Sdn Bhd* [2024] 2 MLJ 652; [2024] 2 CLJ 775; [2024] 2 MLRA 783; [2023] AMEJ 2759 at para 85 to be helpful where His Lordship, Justice Nantha Balan JCA cited with approval the English Court of Appeal's decision in *Markem Corporation and another v Zipher Ltd Markem Technologies Ltd and others v Buckby and others* [2005] EWCA Civ 26; [2005] RPC 761 (CA) containing the following extract from the learned authors of *Phipson* (12th Ed, 1976):

> Where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation

[52] Further, as pointed out by the plaintiff, the communications between the plaintiff and the defendant commenced in December 2015 with the first viewing of one of the defendant's buildings (Tower 5 of PFCC) taking place on 15 December 2015. And, PW2 had sent to the plaintiff its letter of appointment on 16 December 2015. These were at a time when the plaintiff was indisputably licensed to practice. To take issue on the narrow gap between 1 January until 22 April 2016 when the relationship between the plaintiff and

the defendant had commenced in late December 2015 is in my considered a desperate act to seek to avoid liability which should be rejected in principle.

[53] In addition, to allow it to defeat the plaintiff's claim would be disproportionate to the alleged infraction. As long ago as in *St John Shipping Corporation v Joseph Rank Ltd* [1956] 3 All ER 683 Devlin J gave the warning:

> of the danger of overkill and whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression .... although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other.

[54] A careful study of the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 reveals that there is no provision to say that such an alleged breach will invalidate the agreement arrived at between the real estate agent and his client. Thus, I am guided by the trend laid down by the Federal Court in *Lori (M) Bhd (interim receiver) v Arab-Malaysia Finance Bhd* [1999] 3 MLJ 81; [1999] 2 CLJ 997; [1999] 3 AMR 3161; [1999] 1 MLRA 274 (FC) that the common law courts ought to be slow to strike down commercial contracts for illegality. Recently in *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals* [2021] 3 MLJ 914; [2021] 2 CLJ 318; [2021] 2 AMR 52; [2021] 2 MLRA 333 (FC) at paras [54] and [101], Mary Lim FCJ speaking for the Federal Court said:

> [54] The relevant statute complained of must be carefully examined, its purpose or object determined, before the court can conclude one way or another if the contract, act or deed in question is invalidated by such contravention.
>
> ...
>
> [101] That one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without: (a) considering the underlying purpose of the prohibition which has been transgressed; (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim; and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations (laid down by the Supreme Court of UK in *Patel v Mirza* [2017] 1 All ER 191) can be found in the case law. That whilst ...
>
> ...
>
> [109] The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest

in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted.

[55] To allow it to defeat the plaintiff's claim would to my mind, be wholly disproportionate to the alleged infraction of the licensing requirements. In other words, in the circumstances of this case, even if there was an infraction of licensing requirements, for which there is no compelling evidence, I am of the view that the relief should not be denied the plaintiff who had in fact obtained a license for the years 2015 and 2016.

[56] Further, the justice of this case demands that this court should not countenance such a challenge by the defendant. I had occasion to say in *Loke Kooi Chuan Properties Sdn Bhd v Lee Kwee Foh Sdn Bhd & Ors* [2022] MLJU 2007; [2022] CLJU 1942; [2022] MLRHU 1707 (HC) at para 42 the following which I find to be rather apt too for this case.

> [42] To allow D1's grossly belated challenge by seeking to rely upon the provisions of s 258(2) of the Companies Act 1965 would be akin to allowing the use of this provision as an engine of fraud. With D1 having received the purchase price for the 22 Lots, which from the evidence is in accord with the market value then, the justice of this case demands that this Court should not countenance D1's challenge. In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd* [1995] 1 MLJ 113; [1996] 4 CLJ 716, the Federal Court held as follows:
>
> > The true principle which governs such cases as the present is housed in the doctrine of estoppel.
> >
> > The doctrine has reached a stage where it may be applied to prevent or preclude a litigant from raising the provisions of a statute in answer to a claim made against him in circumstances where it would be unjust or inequitable to permit him so to do.
> >
> > The doctrine has been held to be capable of conferring rights upon a litigant by precluding his opponent form challenging title.
> >
> > The equitable jurisdiction by which a personal bar is placed upon a litigant from raising or relying upon the provision of a statute is also contained in the maxim 'equity will not permit statute to be used as an engine of fraud'.

CONCLUSION

[57] Wherefore, judgment is given in favour of the plaintiff against the defendant to the sum of RM1,233,215.13 made up of a sum of RM1,163,410.50 being commission plus a sum RM69,804.63 being the 6% GST together with interest at 5%pa thereon from the date the tenancy agreement between Daehan Rehabilitation Services Sdn Bhd ('Daehan') and

Resort Villa Development Sdn Bhd ('Resort Villa') became unconditional which is 1 September 2019 until one day before the date of judgment (15 November 2024) and interest at 5%pa on the judgment debt including pre-judgment interest calculated from the date of judgment (15 November 2024) until the date of full realisation and costs agreed at RM30,000 subject to allocatur to be paid by the defendant to the plaintiff. The judgment debt is to be paid within 14 days from the date of judgment.

Plaintiff's claim allowed with costs agreed at RM30,000 subject to allocatur to be paid by defendant to plaintiff.

Reported by Dzulqarnain Ab Fatar